GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 463 5292

Carol L. Bjelland
Director
Regulatory Matters

July 7, 1997

Mr. William F. Caton
Acting Secretary
1919 M Street, N. W.
Washington, D. C. 20554

RE: Ex Parte Presentation
WT Docket No. 96-162
LEC-CMRS Safeguards

Dear Mr. Caton:

On behalf of GTE Service Corporation, transmitted herewith, in accordance with the Commission's rules concerning ex parte communications, are copies of an ex parte presentation submitted to Mr. Dan Phythyon, Acting Chief of the Commission's Wireless Telecommunications Bureau.

Questions concerning this matter should be directed to the undersigned.

Sincerely,

Carol L. Bjelland

Attachment

CC: R. Allen
D. Furth
M. Savir
J. Nakahata
T. Koutsky
A. Katz
R. Welch

No. of Copies rec'd 0+1

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1850 M Street, N.W., Suite 1200
Washington, D.C. 20036
(202) 463-5292

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Mr. Dan Phythyon
Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N. W.
Washington, D. C. 20554

RE: EX PARTE: WT Docket No. 96-162
LEC-CMRS Safeguards

Dear Mr. Phythyon:

Throughout the past several months, GTE has engaged in ex parte discussions with various FCC Staff members concerning the issues raised in the LEC-CMRS safeguard proceeding. In these discussions, GTE reiterated points initially raised in its comments and reply comments previously filed in this proceeding, and responded to questions posed by the Staff. In an attempt to clarify for the record our response to such questions, GTE has prepared the following discussion paper, further illustrating points and statements of position originally articulated in our written comments.

Should you or others wish to discuss this matter further, please contact me at your earliest convenience.

This letter, and the attached discussion paper, will be filed with the Office of the Secretary in accordance with the Commission's rules concerning ex parte communications.

Sincerely,

Carol L. Bjelland

Attachment

NEW CMRS "SAFEGUARDS" FOR NON-BOC LECS WOULD BE CONTRARY TO THE RECORD, THE ACT AND THE COURT'S REMAND ORDER (WT Docket No. 96-162)

- The NPRM proposes to impose new CMRS "safeguards" for the first time on non-BOC Tier 1 LECs

- Non-BOC LECs have operated for over a decade without CMRS "safeguards" imposed upon BOCs and their CMRS affiliates

- Availability of a large amount of wireless spectrum ensures that there are sufficient competitors to preclude a LEC CMRS affiliate from having market power in CMRS markets

- The rulemaking record shows that neither GTE nor any other non-BOC LEC has EVER been the subject of a complaint or allegation of anti-competitive conduct of the nature targeted for proscriptive remedies in the NPRM

- The imposition of new "safeguards" to remedy a "non-problem" would be inconsistent with the deregulatory goals and provisions of the Telecommunications Reform Act of 1996

- The imposition of new "safeguards" based upon "predictive judgments" refuted by the facts would be inconsistent with the Court of Appeals' remand order in *Cincinnati Bell*

- A rote extension of BOC safeguards to independent LECs would ignore distinctions long drawn by the FCC, the courts, and codified in the 1996 Act

- The 1996 Act does not create any new incentives or opportunities for LECs to discriminate in favor of their own CMRS ventures

    1. Opening the local exchange to competition removes any ability of LECs to use telephone revenues to subsidize CMRS
    2. Predatory pricing would be economically irrational because the LEC could not successfully drive companies like AT&T and Sprint out of the CMRS market
    3. Sections 251 and 252 interconnection rights open up the LEC network, functions and services to use by competing CMRS providers
    4. CMRS providers, like other CLECs, are serving as "private attorneys general" monitoring LEC actions

- The fact that LEC/IXC safeguards have been retained in an unrelated rulemaking does not require similar LEC-CMRS rules given the record before the Commission in THIS rulemaking

1. The break up of the Bell System was intended to redress BOC discriminations against IXCs, while there is no evidence that LECs have discriminated against their CMRS competitors
2. IXC and CMRS product markets have different characteristics
3. IXC and CMRS geographic markets are significantly different with many CMRS systems falling outside the franchise areas of the LEC
4. IXC dependency and use of LEC facilities is greater than for CMRS

- Last, but not least, the new "safeguards" will impede the ability of GTE and other non-BOC Tier 1 LECs to bring efficiencies, capabilities and innovations to the American public

NEW CMRS "SAFEGUARDS" FOR NON-BOC LECS WOULD BE CONTRARY TO THE RECORD, THE ACT AND THE COURT OF APPEALS' REMAND ORDER

In a *Notice of Proposed Rule Making* ("*NPRM*") adopted last summer in WT Docket No. 96-162, the FCC proposed alternative regulatory schemes to be used to govern the provision of CMRS services by LECs. One of those approaches would impose new separate affiliate and nonstructural safeguards on all non-BOC Tier 1 LECs that provide CMRS offerings. The record before the agency, however, shows no evidence of abuses or complaints concerning non-BOC LEC providers of CMRS, despite nearly a decade of operation free from the proposed regulatory strictures. The amount of available spectrum supports multiple CMRS providers, which ensures that LEC CMRS affiliates do not have market power in CMRS. Under these circumstances, imposition of new and unnecessary restrictions would directly contravene the deregulatory goals of the 1996 Act. Ironically, extension of new regulations in this manner also would fly in the face of the Sixth Circuit's remand order in *Cincinnati Bell Telephone Co. v. FCC,* where the court questioned the FCC's use of unsubstantiated "predictive judgment" in addressing the need for BOC/CMRS safeguards.

There Is No Record Basis for Imposing New CMRS "Safeguards" on Non-BOC LECs

To date, the FCC's structural separation requirements (codified in 47 C.F.R. § 22.903) have been applied only to AT&T and the divested BOCs. The FCC originally applied structural separation requirements to BOCs when cellular was in its infancy because of concerns that such companies might hinder the emergence of competition in the developing cellular marketplace. Section 22.903 no longer applies to AT&T, even though it owns one of the largest CMRS providers. The GTE Telephone Operating Companies (the "GTOCs") and other Tier 1, non-BOC LECs have never been subject to the requirements of Section 22.903 although these carriers or their affiliates have provided in-region cellular service since the early 1980s.

A review of the FCC's enforcement files indicates that no GTE Telephone Operating Company or any other non-BOC Tier 1 LEC has *ever* been the subject of a complaint or allegation of misconduct involving cost-shifting, price discrimination, interconnection discrimination, or other anti-competitive behavior of the sort that the Commission hopes to deter by extending structural separation requirements to these companies. As stated by Bell Atlantic/NYNEX, "Hyperbole and speculation aside, there is no concrete evidence that a LEC has, can or would use landline market power to distort and impair competition in the CMRS market."

The FCC's existing rules contain ample and effective safeguards preventing anti-competitive or discriminatory behavior in the provision of CMRS services by Tier 1 LECs:

- The accounting safeguards in Parts 32 and 64 already prevent misallocation of costs by setting up a comprehensive cost accounting system designed to track costs

accurately, by establishing detailed procedures to ensure that costs from unregulated businesses are excluded from accounts used to establish rates, and by imposing reporting, record keeping, and audit requirements on affected carriers.

- The FCC's complaint process is a fully effective vehicle available to carriers alleging that a GTOC or other Tier 1 LEC has engaged in anticompetitive or discriminatory interconnection practices.

- Sections 251 and 252 of the 1996 Act contain regulatory protections guaranteeing that unaffiliated telecommunications carriers gain fair interconnection to all incumbent LECs' networks.

Imposition of Structural Separation Requirements on Non-BOC LECs Would Violate The Court's Decree in Cincinnati Bell

By proposing to levy regulatory obligations without establishing the necessary factual predicate, the Commission is engaging in precisely the sort of "predictive judgment" struck down by the Sixth Circuit in *Cincinnati Bell Telephone Co. v. FCC.* In *Cincinnati Bell,* the court held that the FCC acted arbitrarily and capriciously by retaining Section 22.903 in light of the agency's own findings that the structural separation requirement is unnecessary in the PCS context and that PCS and cellular services are expected to compete for customers on price, quality, and the type and scope of services. On this basis, the court instructed the Commission either to justify the continuing need for structural separation for BOC provision of cellular services, or to remove Section 22.903 altogether.

The Commission's LEC-CMRS proposals are based entirely on an unfounded *prediction* that LEC and CMRS affiliates will, unless burdened by regulations, violate prohibitions against discrimination and cross-subsidization. The Commission has cited no evidence in support of this unsubstantiated assumption.

Imposition of Structural Separation Requirements on Non-BOC LECs Would Violate the 1996 Act

The 1996 Act establishes a "pro-competitive, deregulatory national policy framework" for the telecommunications industry and requires the FCC to remove all regulatory restraints except where specifically justified. As such, imposition of unnecessary and unjustified separate affiliate rules on non-BOC Tier 1 LECs would directly contradict Congressional intent in passing the 1996 Act.

The 1996 Act establishes a strong national telecommunications policy that protects consumers through competition rather than regulation. To this end, Sections 161(a) and (b) of the Act mandate that the FCC engage in periodic reviews of all of its regulations and eliminate regulations that are no longer necessary.

A Rote Extension of BOC Safeguards To Non-BOC's Such as GTE Ignores Distinctions Long Drawn by the FCC and Codified in the 1996 Act

Congress, the FCC, Judge Greene, and the Justice Department have for years recognized that the GTOCs and other LECs are significantly different from BOCs, and have repeatedly applied substantially different regulation to these companies. *See, e.g., United States v. GTE Corp.*, 603 F. Supp. 730, 736-37 (D.D.C. 1984) (noting that GTOC operations are widely scattered while the BOCs are concentrated and that GTOCs control relatively fewer access lines); *United States v. GTE Corp.*, C.A. No. 83-1298 (D.D.C. Mar. 26, 1992) (granting GTE authority to use "Signaling System 7" technology crossing LATA boundaries; U S West was denied similar authority); *see also* Transcript of Oral Argument at 44, *United States v. GTE Corp.*, C. A. No. 83-1298 (D.D.C. Nov. 22, 1983) (Dep't of Justice attorney stating that "GTE is a different company."). Consistent with this view, various provisions of the 1996 Act (*i.e.*, Sections 271 and 272) and the FCC's rules (*i.e.*, 47 C.F.R. § 22.903) expressly differentiate between BOC and non-BOC LECs.

As the Commission noted in this proceeding, "GTE . . . is released from the constraints of the GTE Consent Decree pursuant to Section 601(a)(2), without any additional conditions, such as establishment of separate affiliates or meeting a competitive checklist, placed upon GTE's entry into in-region interLATA, or any other services."

There is no factual basis for equating GTE and other independent LECs with BOCs. Independent LECs are much less geographically concentrated than the BOCs, serve less densely populated areas, and offer fewer access lines in any state than BOCs. In addition, on average, non-BOC LECs have smaller switches and transmission facilities than BOCs and lack the interexchange network of the more geographically compact BOCs. Independent LECs also typically serve dispersed, less densely populated areas of the country. All of these differences strongly mitigate against any presumption that "safeguards" found appropriate for BOCs are likewise appropriate for non-BOC LECs.

Because the GTOCs' exchange areas are not regional in nature, GTE is dependent on interconnection with other LECs for 80 percent of its CMRS systems. This is in stark contrast to regionally concentrated RBOCs, which have a significantly higher level of CMRS/LEC coverage overlap and extensive networks connecting points within their serving areas.

The 1996 Telecommunications Act Does Not Create Any New Incentives or Opportunities for Non-BOC LECs to Favor Their Own CMRS Ventures

The Act's elimination of state and federal barriers to competitive entry into the local exchange telephone business also eliminates any arguable incentives or opportunities for ILECs to favor their own CMRS ventures. With implementation of the new Act, GTE now faces competition for local exchange business from a wide variety of new entrants that include AT&T, MCI and Sprint. In addition, inclusion of CMRS within the scope of

interconnection rights established for CLECs affords competing wireless carriers statutory guarantees that they can obtain reasonable and non-discriminatory agreements with local ILECs.

In the current environment, any ILEC incentives to discriminate in favor of its own CMRS carrier have been reduced or eliminated for the following reasons:

- Local exchange competition removes any ability of ILECs to fund anti-competitive cross-subsidies to commonly owned CMRS ventures by raising local telephone rates.

- Predatory pricing of CMRS services is clearly illogical because the ILEC would be risking the loss of telephone revenues that could not be recouped either from its telephone ratepayers (because of local competition) or by raising CMRS prices in the future (because major cellular and PCS players such as AT&T, Sprint and others cannot be driven from the marketplace).

- The FCC has already concluded in CC Docket No. 96-149 and the SBC-PacTel merger that price squeezes are unlikely, which is why the FCC concluded that ILECs had no market power in the interexchange market; this analysis would lead to the same conclusion with respect to ILEC participation in in-region CMRS markets.

- The significant interconnection and non-discrimination rights under Section 251 of the Act insure that CMRS and Wireless Local Loop providers have full access to the ILEC's networks, unbundled network elements and services to end users.

- Competing CMRS providers, like any other CLEC, are serving as "private attorneys general" that constantly monitor ILEC activities for any possible discriminations, and they have shown no reticence in filing complaints with the FCC or state PUCs on other issues to redress alleged violations of the Act's non-discrimination provisions.

- In order for discrimination to benefit a LEC CMRS affiliate, it would have to advertise the superior quality interconnection or additional functionality to customers, which would certainly be detectable by the aforementioned private attorneys general.

In view of the foregoing, there can be no serious question that the changes wrought by the 1996 Act have reduced incentives and opportunities for ILECs to favor their own CMRS ventures operating within their telephone exchange areas. The only changed circumstance is the removal of ILEC control over the local exchange telephone market. And now that local telephone services are subject to competition, the opportunity to successfully cross-subsidize competitive ventures with local service revenues is radically reduced. This hardly suggests the need for imposing separate affiliate requirements on companies like GTE that have not been the subject of any complaints in the past.

There Is No Basis for Importing LEC/IXC Regulations into the CMRS Market

There is no reason to believe that regulatory symmetry warrants the imposition of LEC/IXC regulations on LEC providers of CMRS. Indeed, such an outcome would be irrational for several reasons:

- Product markets are different. IXC and CMRS have traditionally been viewed as participants in different service markets. While CMRS may show signs of convergence with local exchange services through wireless local loop offerings, CMRS providers generally only participate in the interexchange market through resale of IXC services.

- Geographic markets are different. IXC services are provided on a nationwide basis. In contrast, broadband CMRS providers operate generally in MTA or BTA markets. Although roaming is available nationwide, roamers often obtain service from unaffiliated CMRS providers with none of the concerns about interconnection from affiliated LEC operations. While nationwide paging licenses have been issued, they remain predominantly messaging services which do not directly compete with IXC services.

- CMRS customer mobility significantly undermines any perceived advantage of LEC in-region operations because customers place calls irrespective of the boundaries of the wireline carrier providing interconnection to LEC facilities. Because 80 percent of GTE CMRS markets are out of region, any perceived advantage of in-region operations is significantly less than what might attach to local exchange customers selection of interexchange services.

- IXC use of LEC facilities is more extensive than for CMRS since CMRS technology involves tower sites and radio transmitters and receivers that are not usable for providing local exchange service.

- CMRS has no history of abuses by LECs. The divestiture of the Bell System was largely prompted by anti-competitive practices involving uses of the local exchange to disadvantage IXC competitors. In contrast, as the record in this rulemaking shows, there is no evidence that LECs have discriminated against unaffiliated CMRS providers.

Customers and Competition Will Benefit if the FCC Does Not Adopt Regulations That Will Impede Business Flexibility

The 1996 Act recognizes that business flexibility will benefit customers and competitors alike. Flexibility allows independent LEC CMRS systems to respond rapidly to offerings of competitors that do not suffer from structural separation requirements. This competition will

be impeded if the FCC imposes differential regulatory requirements on LEC-affiliated and unaffiliated CMRS providers.

If companies like GTE are forced to provide CMRS offerings through a separate affiliate, the efficiencies potentially derived from LEC/CMRS integration may be lost. In addition, because the definition of in-region and out of region will be blurred in the CMRS context because of different geographic boundaries used in wireline and wireless markets, operational difficulties will likely result from the different regulatory treatment. As a result, independent LEC service providers will have to bear unnecessary, increased costs, which can adversely affect customers.

The provision of new services and innovations may be impaired by the adoption of the Commission's proposed rules – if a LEC/CMRS provider is not allowed to integrate fully its landline and wireless operations, new technological features may not be available to wireless customers because a LEC provider may not have the capability to offer such services without the use of its wired network.

Conclusion

For the reasons set forth above, GTE urges the FCC to refrain from adopting new separate affiliate and nonstructural safeguards on non-BOC LEC provision of CMRS services. Imposition of these requirements cannot be reconciled with the *Cincinnati Bell* decision, the 1996 Act, or the record before the agency. The only practical effect of such an action would be to deny the public the benefits of efficiencies, innovation and robust competition.